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IN THE

Supreme Court of the United States

October Term, 1949.
No. 353.

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

PETITIONER'S REPLY BRIEF.

Statement.

Respondents' brief is silent as to considerations advanced by us, which, in and of themselves, are sufficient to warrant the issuance of the writ; and the arguments made by respondents are not maintainable.

The Petition for Certiorari seeks a review of the judgment of the Supreme Court of California on two grounds.

1. The proceeding in the Superior Court did not meet the requirements of due process, because the judgment of that Court, affirmed by the state Supreme Court, rested solely on the Referee's Report as to the overdraft, the order enlarging the reference to embrace the rights of the parties *inter se,* and the stipulation of the parties other than petitioner for the allocation of water; and (a) the Referee's Report was the result of secret private investigations conducted by the changing personnel of a quasi-public corporation, and not the result of a full and fair public hearing held by a responsible public officer or a board made up of responsible persons; and (b) neither the pleadings, the order enlarging the reference, the Referee's Report, nor the stipulation gave petitioner notice of (and petitioner does not yet know) the nature, character, or particulars of the claims of the respective respondents which have been determined by the state Supreme Court.

2. In order to transfer petitioner's water rights to the other parties to the action, the state Supreme Court changed state law retroactively: (a) the state Supreme Court held that the mere fact of the alleged overdraft

gave petitioner causes of action against the respective other water users in the forty square mile area, and the lowering of the water levels in petitioner's wells gave petitioner constructive notice of its causes of action; hence, by not suing the several respondents within the five year period petitioner lost its water rights; and (b) under the long existing prior law petitioner had no such causes of action, because the overdraft did not constitute adverse user by the several respondents, and the lowering of the water levels was equivocal and gave no notice of the overdraft; consequently, petitioner has been deprived of its water rights without having had its day in court.

In their brief, respondents pass in silence the features of our first point, other than the sufficiency of the Referee's Report. In that behalf they rely on *Pacific Live Stock Company v. Lewis* (1916), 241 U. S. 440. Relative to our second point, respondents content themselves with claiming that the state Supreme Court has not changed the pre-existing law and trying to demonstrate as a general proposition that questions of state or general law are not federal questions.

ARGUMENT.

POINT I.

Pacific Live Stock Company v. Lewis (1916), 241 U. S. 440, Is Not in Point, and If It Were It Would Necessarily Yield to Morgan v. United States (1936), 298 U. S. 468 (1938), 304 U. S. 1, and Ohio Bell Telephone Co. v. Public Utilities Commission (1937), 231 U. S. 292.

In our Brief in Support of the Petition we point out that the *Pacific Live Stock* case was decided under an Oregon statute which required that the Report of the Referee could be made only after a full and fair hearing in which witnesses were sworn and examined and a record of all the evidence was preserved (p. 66).

In the *Pacific Live Stock* case this Court affirmed the judgment of the United States District Court for Oregon, dismissing a suit to enjoin a proceeding before the State Water Board for the determination of the relative rights of the claimants to the water of a stream for irrigation and other beneficial purposes.

The salient features of the Oregon statute authorizing the proceedings before the State Water Board were stated by Mr. Justice Van Devanter as follows:

> "Every material step in the proceeding is to be attended with notice and an opportunity to be heard, the adequacy of which is manifest. In the beginning each claimant is required to present to the division superintendent a *sworn statement of his claim, showing its nature, inception, and extent, and all the par-*

ticulars upon which it is based. * * * Any claimant desiring to contest the claim of another may present to the division superintendent a sworn statement showing the grounds of contest, and *obtain a hearing* before that officer, *at which the parties may present whatever evidence they have, and may secure the attendance of witnesses by compulsory process.* After the evidence in the contests is taken, it and the sworn statements of the several claimants, with the report of the engineer's measurements and observations, are to be laid before the board,—the statements and the report both being regarded as evidence appropriate to be considered. *The board is then to examine all the evidence,* make findings of fact therefrom, enter an order embodying the findings and provisionally determining the relative rights of the several claimants, and *transmit the evidence and a copy of the order to the circuit court of the county wherein the stream or some part of it lies."* (244 U. S., pp. 443-444.) (Emphasis supplied throughout.)

Commenting upon the "sworn statements of the several claimants, with the report of the engineer's measurements and observations," Mr. Justice Van Devanter said:

"And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then *opened to public inspection,* that opportunity is given for contesting them, and that, upon the hearing of the contests, *full opportunity is had for the examination of witnesses, including those making the*

statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment." (244 U. S., p. 453.)

None of the safeguards above referred to was observed in the present proceeding.

(a) While the judgment undertook to establish claims of a prescriptive character against petitioner, no such claims were ever stated in the pleadings, the order enlarging the reference, or the stipulation, and no particulars of any claims were ever given (Petition, pp. 4, 5-6, 10-11).[1]

(b) In the proceedings before the Referee, petitioner was not entitled to have witnesses sworn or to secure the attendance of witnesses by compulsory process, and the Referee's Report was based on private investigations extending over a period of at least three years, without holding any hearing or hearings, or calling or swearing any witnesses. (Our Brief in Support of Petition, p. 49. Petition, pp. 14-19.)

(c) All the data collected by the Referee was not reported to the Court, and a portion of it was not preserved. (Petition, p. 14.)

(d) The Report of the Referee was not made by a board or commissioner that examined "all the evidence and made

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[1]The allegations in the Petition were not denied, and are supported by the Record, pages 1-442.

findings of fact thereon" but was the work of many hands, and it is impossible to ascertain who did the particular work. (Petition, p. 14.)

(e) At the time of the hearing, many of the craftsmen who contributed to the Referee's Report were deceased, in parts beyond the seas, or otherwise beyond the reach of process. (Petition, pp. 15-16.)

(f) The deputy state engineer who prepared the findings was not familiar with the detail of the evidence (Petition, pp. 17-19); and the State Engineer who signed the Report had no part in the investigation or making the Report. (Petition, p. 15.)

Plainly, *Pacific Live Stock Company v. Lewis* is not in point here.

The very deficiencies in the proceedings before the Referee and the Superior Court, above enumerated, which make the *Pacific Live Stock* case inapplicable here, bring the present case within the rules specifically laid down in the two *Morgan* cases and the *Ohio Bell Telephone* case. (See Brief in Support of Petition, pp. 57-62.)

POINT II.

The Supreme Court of California Could Not Change the Law Retroactively, and Thereby Deprive Petitioner of Its Vested Water Rights Without Granting Petitioner Its Day in Court.

Respondents claim that the decision of the California Supreme Court in the case at bar does not change the pre-existing law. In that behalf they fail to notice the decisions reviewed by Carter, J., in his dissenting opinion [R. pp. 787, 788-790, 794-800, 803-805], the decisions reviewed in the two opinions rendered in the District Court of Appeal [R. pp. 688, 714-716, 720-721, 732-736, 737-738], and the decisions reviewed in our Brief in Support of Petition (pp. 82-85).[2]

Respondents place their reliance upon *Hudson v. Dailey* (1909), 156 Cal. 617, 105 Pac. 748, and *Miller v. Lux*

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[2]The repugnance of respondents' claims (later adopted by the state Supreme Court) to existing law is clearly shown by Shinn, P. J., in his concurring opinion in the Court of Appeal: "The rights of an appropriator are not invaded by withdrawals of water by others which do not interfere with his present use and give him a right to legal redress. A use which does not amount to such interference is not legally adverse so as to initiate a claim of prescriptive status. The cases so holding are cited in the main opinion. *Respondents contend that a different rule applies to prescriptive claims to percolating water, and that appropriative rights therein are invaded by every use that is made of it when the total uses exceed the average annual supply. This alleged invasion, they claim, renders all uses mutually adverse. It is a novel theory, unsupported by authority and, in my opinion, insupportable in reason.*" [R. p. 732.]

"The theory that withdrawals from a diminishing supply amount to mutual adversity of use as a principle of law is novel, and has been shown to be unsound. It is in irreconcilable conflict with settled principles of the law of prescriptive titles, whether to water rights or other classes of property. It assumes adverse use where

Enterprise Canal Etc. Co. (1915), 169 Cal. 415, 147 Pac. 567.

But those cases are not in point.

In *Hudson v. Dailey, supra,* the plaintiff was actually deprived of her water, and the act which caused it was evident. Defendant Currier sank seven wells in the bed of the creek close to plaintiff's dam, and proceeded to operate them with plaintiff's knowledge for upwards of five years before the filing of plaintiff's suit.

In other words, there was something more than a mere overdraft and the lowering of the level in plaintiff's wells. There was an immediate and obvious lowering of the water in a surface stream. The plaintiff was out of water, and the cause of it was evident. She knew the cause and who was responsible for it, yet she slept on her rights for the statutory period.

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none exists and would set up prescriptive titles to obliterate vested rights of priority. Priority of right is as sacred as any other type of ownership. It is the rule rather than the exception in our water law. The appropriative system is wholly one of priority. The superior rights of riparian and overlying owners are in reality priorities of right, although not based, as appropriative rights are, upon priority in time. *Priority of right in the use of water is not dependent upon there being a sufficient supply for all users. Upon the contrary, priority is of consequence only in times of actual or threatened deficiency of supply, and if it is not to be protected under such conditions, the right means nothing.*

"If priority of right is to be abandoned in the law of percolating water, in times of overdraft, it must be by legislative action. Even if that were done, vested rights of priority would have to be protected. Such vested rights of priority, as this appellant has, have been overridden by the judgment." [R. p. 738.]

The majority opinion of the state Supreme Court on the point [R. pp. 777-780] is no more than a rationalization of a conclusion reached without regard to pre-existing law. (Brief in Support of Petition, pp. 73-81.)

Respondents assert that "two uses made simultaneously from a basin are necessarily inconsistent and antagonistic," citing *Miller & Lux v. Enterprise Canal, etc. Co., supra.*[3]

Miller & Lux v. Enterprise, supra, supports no such theory. The Enterprise Canal Company had erected a diversion dam in the San Joaquin River immediately below a slough on which Miller & Lux originally had riparian rights. The water backed up by the dam was to a large extent stored in plaintiff's slough, and the whole stream, including the stored water, was diverted by defendant

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[3]From this it would seem to follow that there could not be two non-conflicting users of water out of the Raymond Basin and, therefore, any use of Raymond Basin water made openly, notoriously, and under claim of right as against all other owners and producers, is an adverse use and forms the basis of a prescriptive right, particularly if there is an insufficiency of water for both, or all, users. Nothing could be more absurd. To establish a prescriptive right by adverse use, there must be a rightful owner and a wrongful trespasser. Only the wrongdoer, by his trespass, establishes a prescriptive right; not by taking public water or other property subject to appropriation, but by misappropriating privately owned water, or other property. Thus, both the rightful owner and the wrongdoer must each be identified. As long as one is taking water to which he has a priority right, he is not a wrongdoer and can acquire no title thereto by prescription. The wrongful nature of the act is not presumed but must be proved. Where the operator has a right, his development of water is necessarily under that right and not wrongful. Thus the establishment of the priorities is unavoidable, in order to determine in case of overdraft, who was the wrongdoer in creating the overdraft and whose water he misappropriated. If and when there was an overdraft, the rightful owners of priorities may have kept within their rights and priorities at all times. The wrongdoer either took the priority water of some particular legal owner, who can and must be identified, or he took water indiscriminately and thus only from him who had the most recent priority and thus the weakest right. It is a mere dodging of the issue to assume, without proof, that all the operators were wrongdoers, each equally guilty of creating the overdraft; that all the original owners lost their legal rights proportionately and that all acquired prescriptive rights, regardless of the dates of acquisition, in the ratio that their most recent diversions by pumpage or surface diversions (ignoring for the moment the fact that the surface diversions were not reduced) bore to the total of all diversions.

through a canal to various communities below, where for more than twenty-five years it had been dedicated to public service, *all of it*, with the knowledge and acquiescense of the plaintiff, and thus placed beyond recall from such service and use in any part by plaintiff. The original diversion was without any grant of right from plaintiff, but because plaintiff had so acquiesced in its dedication to public service, it was held estopped to reclaim and use any of the water. Defendant's use of the water was unquestionably inconsistent with and antagonistic to any use of the water by plaintiff. There was no claim of right by prescription. As here, various essentials of a prescriptive right were not present. The Court simply held that plaintiff's private right must give way to the public interest, that plaintiff from and after the time of dedication could neither use the water nor enjoin its use by defendant, but was relegated to a claim for damages.

In an attempt to bolster up their position, respondents refer to a stipulation, in which petitioner joined, "that the taking of water by each party was under a claim of right," and say that the stipulation "sufficiently disposes of petitioner's contentions and fully justifies the conclusion of the court as set forth in its opinion." (Their brief p. 26.)

Neither the state Supreme Court nor the District Court of Appeal took any such view of the stipulation.

In its opinion the state Supreme Court said:

> "We must look, therefore, to see if the disputed elements for a prescriptive right are shown by the record. Most of the factors are covered by the stipulation in which all the parties, including appellant, joined, namely, that 'all of the water taken by each of the parties to this stipulation and agreement

was, at the time it was taken, taken openly, notoriously, and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein.' *Two necessary elements are omitted: The length of the period over which the adverse user continued and the nature and extent of actual adverse user, if any.*" [R. p. 777.]

The state Supreme Court then proceeded to hold (1) that the overdraft itself constituted an invasion, and therefore adverse user; and (2) that the lowering of the water table in petitioner's wells gave constructive notice. [R. pp. 777-779.]

See, also, opinion of Court referring to stipulation, and holding that overdraft did not constitute adverse user. [R. pp. 713-716.]

We have shown in our Brief in Support of the Petition that the decision of the state Supreme Court in the above respects is contrary to theretofore existing law (pp. 74-85); and, as we have shown above, respondents have not met our argument in that behalf.

Respondents devote much space to undertaking to argue the irrelevant proposition that "questions of state or general law are not federal questions" (their brief pp. 18-23), but pass in silence *Shelley v. Kraemer* (1948), 334 U. S. 1; *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U. S. 673, and other authorities (Brief in Support of Petition, pp. 70-72) holding that action which the due process clause forbids legislatures to take, it forbids courts to adopt, particularly where such action deprives a person of property without his day in court (p. 71).

Conclusion.

In our Brief in Support of the Petition we state:

> "The cases believed particularly to sustain the jurisdiction are: *Morgan v. United States* (1936), 298 U. S. 468; *Morgan v. United States* (1938), 304 U. S. 1; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U. S. 292; *Carter v. Kubler* (1943), 320 U. S. 243; *Shelley v. Kraemer* (1948), 334 U. S. 1; and *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U. S. 673." (P. 41.)

The specific application of those cases here is definitely shown in our brief. (See "Table of Authorities Cited.")

Respondents pass over without comment the two cases last cited.

Except for a few half-hearted references to the first three cases (Resp. Br. pp. 12-15), respondents made no effort to deal with them, except by citing and quoting from *Pacific Live Stock Co. v. Lewis* (1916), 241 U. S. 440.

Manifestly, even though the *Pacific Live Stock* case were in point here (and we have shown that it is not) it would have to yield to the authority of the two *Morgan* cases, the *Ohio Bell Telephone* case, and *Carter v. Kubler.*

It is submitted that the Writ of Certiorari should issue as prayed.

Respectfully submitted,

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